UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

RICARDO DEVENGOECHEA, Plaintiff, v. BOLIVARIAN REPUBLIC OF VENEZUELA, a foreign state, Defendant.	Case No. 12-CV-23743-PCH

STATEMENT OF INTEREST
OF THE UNITED STATES OF AMERICA

Plaintiff is seeking to levy upon the bank accounts of diplomatic and consular missions of the Republic of Venezuela and of its missions to the United Nations and the Organization of American States, in an effort to enforce a default judgment he obtained against Venezuela from this Court. The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517[1] to inform the Court of the United States' obligations under international agreements which provide for the immunity of such bank accounts and thus preclude any attempt by plaintiff to enforce the default judgment by attaching, executing on, or preventing Venezuela from drawing on, funds in official bank accounts used for mission purposes. The United States also explains that, even if one or more of the bank accounts at issue here were not immune from attachment under international agreements, property of Venezuela may be attached only in accordance with the requirements of the Foreign Sovereign Immunities Act ("FSIA"), which are explained below.

[1] That statute authorizes the Attorney General of the United States to send any officer of the Department of Justice "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

BACKGROUND

Plaintiff, Ricardo Devengoechea, brought this action, alleging that he loaned a collection of artifacts relating to Simon Bolivar to the Venezuelan government, which the government then failed to return. *See* Compl. ¶¶ 40-42, ECF No. 1 (Oct. 15, 2012). Plaintiff sought a declaratory judgment affirming his ownership of the collection, the imposition of a constructive trust on the collection, and either an order directing Venezuela to return the collection or an award of money damages. *See id*. ¶¶ 35-51.

The Court found that plaintiff had effectively served Venezuela under § 1608(a)(2) of the FSIA by following the procedures for service under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, to which both the United States and Venezuela are parties. *See* Findings of Fact & Conclusions of Law, at 2-3, ECF No. 27 (Apr. 25, 2014). Venezuela did not appear, and the clerk entered a default against Venezuela. *See* i*d*. at 3. Following a bench trial on damages, the Court entered final judgment on April 24, 2014, finding that Venezuela was liable for conversion of the collection and awarding plaintiff damages for the reasonable value of the collection, plus pre-judgment and post-judgment interest and costs, for a total judgment of $7,464,953.12. *See id*. at 8-9; Final Judgment, ECF No. 26 (Apr. 25, 2014).

Plaintiff subsequently filed a motion requesting that the clerk of court issue a writ of garnishment against Bank of America in an effort to execute the judgment against Venezuela. *See* Pl.'s Mot. for Issuance of a Post-Judgment Writ of Garnishment to Bank of America Corp., ECF No. 30 (Oct. 8, 2014). The clerk issued the writ of garnishment and Bank of America filed an answer, identifying seventeen accounts that may be subject to the writ in the names of Venezuela's Embassy; its consulates in Boston, San Francisco, Chicago, and New York; its

Permanent Mission to the United Nations ("U.N. Mission"); its Permanent Mission to the Organization of American States ("OAS Mission"); and Venezuela's Defense Attaché Office. *See* Answer to Writ of Garnishment & Demand for Attorney's Fees, at 2-4, ECF No. 33 (Oct. 15, 2014). Bank of America stated that, pursuant to Florida law, it had frozen or set aside the funds in these accounts, which total approximately $3.6 million. *See id*. at 5-7. At the same time, Bank of American filed an emergency motion for clarification in which it requested an expedited hearing to resolve whether the accounts are subject to garnishment, noting that they may be immune and that the Court may not have in rem jurisdiction over accounts that were not opened in Florida. *See* Garnishee, Bank of America, N.A.'s Emergency Mot. for Clarification, at 3-4, ECF No. 34 (Oct. 15, 2014).

The Court held a hearing on Bank of America's emergency motion and subsequently issued an order allowing Bank of America to temporarily process transactions from the bank accounts to enable Venezuela to conduct its ordinary course of business. *See* Order on Garnishee's Emergency Mot. for Clarification, ECF No. 40 (Oct. 17, 2014). The Court set the matter for a continued hearing on October 22, 2014. *Id*. On October 21, 2014, Venezuela filed a motion to dissolve the writ of garnishment, as well as declarations from officials attesting, based on personal knowledge of the accounts at issue, that the accounts are used by Venezuela for purposes of its missions and consulates. *See* Motion to Dissolve Writ of Garnishment and Supporting Memorandum of Law, ECF No. 52 (Oct. 21, 2014); Notice of Filing Declaration, ECF No. 51 (Oct. 21, 2014) (attaching the declarations of Paula Carozzo de Abreu, Williams Suarez, and Marlene Gonzalez).

ARGUMENT

A. UNDER INTERNATIONAL AGREEMENTS TO WHICH THE UNITED STATES IS A PARTY, THE BANK ACCOUNTS OF VENEZUELA'S EMBASSY, CONSULATES, U.N. MISSION, AND OAS MISSION ARE IMMUNE FROM ATTACHMENT OR EXECUTION

Applicable treaties, which are binding on federal courts to the same extent as domestic statutes, establish the immunity of the bank accounts of Venezuela's Embassy, consulates, U.N. Mission, and OAS Mission. Although the FSIA serves as the exclusive basis for jurisdiction over foreign states in federal and state courts and also governs the execution of judgments obtained against foreign states, it is well-established that the FSIA does not displace the immunities provided by these treaties. *See generally Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Cook v. United States*, 288 U.S. 102, 120 (1933). When it enacted the FSIA, Congress recognized that the United States had existing international legal obligations with respect to the protection of diplomatic and consular property. Congress therefore provided that the FSIA provisions addressing the immunity from attachment and execution of a foreign state's property were "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act." 28 U.S.C. § 1609; *see also* H.R. Rep. No. 94-1487, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610 (noting that the FSIA is "not intended to affect either diplomatic or consular immunity"); *767 Third Avenue Assocs. v. Perm. Mission of the Republic of Zaire to the U.N.*, 988 F.2d 295, 298 (2d Cir. 1993) ("Because of this provision the diplomatic and consular immunities of foreign states recognized under various treaties remain unaltered by the Act.").

At the time the FSIA was enacted, the United States had already entered into several international agreements establishing its obligations to protect the property of diplomatic and consular missions from interference. The Vienna Convention on Diplomatic Relations

("VCDR") and the Vienna Convention on Consular Relations ("VCCR")—to which Venezuela is also a party—obligate the United States to ensure that diplomatic and consular missions are accorded the facilities they require for the performance of their diplomatic and consular functions. Article 25 of the VCDR provides that "the receiving state shall accord full facilities for the performance and functions of the mission." VCDR, art. 25, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502. Article 28 of the VCCR similarly provides that "the receiving state shall accord full facilities for the performance of the functions of the consular post." VCCR, art. 28, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. 6820.

With respect to missions to the United Nations ("U.N."), the U.N. Charter provides that "representatives of the Members of the United Nations . . . shall . . . enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." U.N. Charter, art. 105, para. 2, June 26, 1945, 59 Stat. 1031, T.S. No. 993. In addition, the United States has agreed that representatives to the U.N. "shall . . . be entitled . . . to the same privileges and immunities . . . as [the United States] accords to diplomatic envoys accredited to it." Agreement Between the U.N. and the United States Regarding the Headquarters of the U.N., art. V, § 15, June 26, 1947, T.I.A.S. 1676; *see also* Convention on the Privileges and Immunities of the U.N., art. IV, § 11(g), Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. 7502 (entered into force with respect to the United States Apr. 29, 1970) (stating that representatives of U.N. members shall enjoy "such . . . privileges, immunities and facilities . . . as diplomatic envoys enjoy"). Similarly, with respect to missions to the Organization of American States (OAS), the bilateral agreement between the United States and the OAS on privileges and immunities provides that certain diplomatic-level mission members enjoy "the same privileges and immunities in the United States . . . as the United States accords to diplomatic envoys who

are accredited to it." Agreement Between the United States and the OAS, art. 1, Mar. 20, 1975, 26 U.S.T. 1026; *see also* 22 U.S.C. 288g. These agreements ensure that diplomats accredited to the U.N. and OAS, and the permanent missions through which they operate, receive the same protections as diplomats and missions accredited to the United States, including the protections accorded to diplomatic property by the VCDR. *See 767 Third Avenue Assocs.*, 988 F.2d at 298 (applying VCDR to define protection afforded to U.N. permanent mission); *Avelar v. J. Cotoia Constr., Inc.*, No. 11-CV-2172 (RRM)(MDG), 2011 WL 5245206, at *4 (E.D.N.Y. Nov. 2, 2011) (explaining that the VCDR "applies with equal force to missions accredited to the United Nations and the United States, with respect to immunity against execution and levy of mission assets").

Courts have drawn on these international agreements to recognize that bank accounts of diplomatic and consular missions that are used for mission purposes are immune from attachment or execution, because a mission's access to its bank funds in the receiving state is critical to the functioning of a mission. In *Liberian Eastern Timber Corp. v. Government of the Republic of Liberia*, 659 F. Supp. 606, 608 (D.D.C. 1987), for example, the court relied on Article 25 of the VCDR to grant Liberia's motion to quash writs of attachment seizing its embassy's bank accounts. The court determined that "[t]he Liberian Embassy [would] lack[] the 'full facilities' the Government of the United States has agreed to accord if, to satisfy a civil judgment, the Court permits a writ of attachment to seize official bank accounts used or intended to be used for purposes of the diplomatic mission. *Id*. Similarly, in *Foxworth v. Permanent Mission of the Republic of Uganda to the United Nations*, 796 F. Supp. 761 (S.D.N.Y. 1992), a personal-injury plaintiff obtained a default judgment against Uganda's U.N. Mission, which she sought to satisfy by a writ of execution against that mission's bank account. Granting Uganda's

motion to vacate the writ of execution, the court held that "attachment of defendant's bank account is in violation of the United Nations Charter and the [VCDR] because it would force defendant to cease operations." *Id*. at 763; *see also Avelar*, 2011 WL 5245206, at *4 (vacating plaintiff's execution of a default judgment against bank accounts of Congo's U.N. Mission, because "bank accounts used by the mission for diplomatic purposes are immune from execution under [Article 25 of the VCDR], as necessary for the mission to function"); *Sales v. Republic of Uganda*, No. 90 Civ. 3972, 1993 WL 437762, at *1 (S.D.N.Y. Oct. 23, 1993) ("It is well settled that a foreign state's bank account cannot be attached if the funds are used for diplomatic purposes.").[2]

In each of the cases cited above that address the "full facilities" provision, the foreign state submitted a declaration stating that the bank accounts at issue were used for the functioning of the mission. Here too, Venezuela has filed with the Court three signed declarations from high-ranking officials with knowledge of the accounts, attesting that the funds in all of the accounts are used by Venezuela for purposes of its missions and consulates. *See* Notice of Filing Declaration, ECF No. 51 (attaching the declarations of Paula Carozzo de Abreu, Williams Suarez, and Marlene Gonzalez). Courts have concluded that such declarations are dispositive in establishing that bank accounts are "official bank accounts used or intended to be used for purposes of the diplomatic mission," and have not ordered discovery to examine the mission's

[2] Because international agreements govern the immunity of diplomatic and consular accounts, and the accounts of U.N. and OAS Missions, the FSIA exceptions to immunity from attachment discussed below, *see infra.*, Argument B, are simply "inapplicab[le]" to an analysis of the validity of attachment. *767 Third Avenue Assocs.*, 988 F.2d at 297. Thus, use of the funds in mission bank accounts in connection with the performance of mission functions, which for other purposes might be considered commercial transactions, does not remove the immunity to which such accounts are entitled under the "full facilities" provisions of the relevant international agreements. *See* VCDR, art. 25; *id*., art. 31 (acknowledging that diplomats will engage in certain commercial activities as part of their official duties without losing immunity for such activities); *Tabion v. Mufti*, 73 F.3d 535, 538-39 (4th Cir. 1996) (explaining that a diplomatic agent will not enjoy immunity with respect to "commercial activity . . . outside his official functions," which refers to "the pursuit of trade or business activity" unrelated to the diplomatic mission).

budget and records. *Liberian E. Timber Corp.*, 659 F. Supp. at 608; *see also Avelar*, 2011 WL 5245206, at *4 ("A sworn statement from the head of mission is sufficient to establish that a bank account is used for diplomatic purposes."); *Sales*, 1993 WL 437762, at *2 (noting, to remain consistent with principles of sovereign immunity, reliance on the foreign state's declaration is necessary to avoid "painstaking examination of the Mission's budget and books of account");[3] *Foxworth*, 796 F. Supp. at 762. Accordingly, the Court should accord the bank accounts of Venezuela's Embassy, consulates, U.N. Mission, and OAS Mission immunity from attachment and execution in furtherance of the United States' international obligations, and vacate the garnishment of such accounts.

Efforts to attach or execute on foreign mission or consular property also implicate important foreign policy interests of the United States. The attachment of or execution on a mission's or consulate's bank accounts may adversely affect the United States' relationships with foreign states. Furthermore, such actions raise reciprocal concerns for the treatment of U.S. missions abroad; the United States vigorously opposes efforts by private parties to attach its diplomatic accounts abroad, including by seeking to enlist the assistance of the government of the receiving state in such cases. *See Boos v. Barry*, 485 U.S. 312, 323 (1988) (respecting diplomatic immunity "ensures that similar protections will be accorded those that we send abroad to represent the United States"). For these reasons as well, the Court should ensure that

[3] Venezuela's motion to dissolve the writ of garnishment indicates that plaintiff served a subpoena on Bank of America, requesting detailed information about Venezuela's mission and consulate bank accounts. *See* Ex. E to Notice of Filing Declaration, ECF No. 51-6 (Oct. 21, 2014). It is not clear whether the Court will address this subpoena at the October 22, 2014 hearing. In any event, the United States also would note that the VCDR provides protections that limit the availability of discovery into the property of diplomatic missions. *See* Brief for the United States of America as *Amicus Curiae* in Support of Reversal, at 18-23, *Thai-Lao Lignite Co. Ltd. v. Government of the Lao People's Democratic Republic*, No. 13-495-cv(L); 13-545-cv(CON) (2d Cir. May 17, 2013).

the bank accounts of Venezuela's Embassy, consulates, and missions to the U.N. and OAS are accorded the full protections to which they are entitled under international law.

B. A FOREIGN SOVEREIGN'S PROPERTY MAY BE ATTACHED ONLY IN ACCORDANCE WITH THE FSIA

Even if one or more of the bank accounts at issue here were not immune from attachment under the international agreements discussed above, the Court still must ensure compliance with the FSIA's provisions governing the attachment of or execution on a foreign state's property. *See, e.g., Liberian E. Timber Corp.*, 659 F. Supp. at 608-10. Under § 1609, a foreign state's property in the United States is immune from attachment, including garnishment, unless a specific statutory exception to immunity applies. *See* 28 U.S.C. § 1609; H.R. Rep. 94-1487, at 28 (noting that the "term 'attachment in aid of execution' in the FSIA is intended to include attachments, garnishments, and supplemental proceedings under applicable Federal or State law to obtain satisfaction of a judgment"). Furthermore, § 1610(c) of the FSIA prohibits attachment of or execution on a foreign state's property unless the court has issued an order determining such attachment or execution to be appropriate under the statute after a reasonable period of time following entry of the judgment (including service of a default judgment under 1608(e), where required). *See* 28 U.S.C. § 1610(c); H.R. Rep. 94-1487, at 30 (explaining that allowing a judgment creditor to attach or execute on a foreign state's property simply by applying to the clerk or a local sheriff "would not afford sufficient protection to a foreign state"); *Avelar*, 2011 WL 5245206, at *5 n.8 ("[T]he FSIA requires that any steps taken by a judgment creditor to enforce the judgment must be pursuant to a court order authorizing the enforcement, independent of the judgment itself, and not merely the result of the judgment creditor's unilateral delivery of a writ to the sheriff or marshal."). A court must find an exception to immunity to permit attachment even if the foreign government does not appear; and the judgment creditor bears the

burden of identifying the particular property to be executed against and proving that it falls within a statutory exception to immunity from execution. *See, e.g.*, *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 293-94, 297 (2d Cir. 2011); *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 796, 799, 801 (7th Cir. 2011) (explaining that courts are required "to determine—*sua sponte* if necessary—whether an exception to immunity applies," a determination that must be made "regardless of whether the foreign state appears"); *Peterson v. Islamic Republic Of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010) ("[C]ourts should proceed carefully in enforcement actions against foreign states and consider the issue of immunity from execution *sua sponte*."); *Walker Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229, 233 (5th Cir. 2004).

The writ of garnishment at issue here (ECF No. 31) was signed by the clerk of court on plaintiff's motion; it was not issued pursuant to a court order determining that Bank of America held property subject to attachment under the FSIA. Because the procedural requirements of the FSIA were not satisfied, the writ of garnishment should be vacated. *See Avelar*, 2011 WL 5245206, at *5 n.8 ("Plaintiff's failure to procure an independent court order requires also that the enforcement mechanisms be vacated."); *FG Hemisphere Assoc., LLC v. Republique du Congo*, 455 F.3d 575, 594 (5th Cir. 2006) ("*Prior to issuing a garnishment order*, a district court must make factual findings that support application of the § 1610(a) exception to executional immunity during the situs snapshot for *each* form of property." (first emphasis added; second emphasis in original)).[4]

[4] The United States does not take a position on whether any of the accounts identified in Bank of America's answer (even if they were not protected by the international agreements described above) might satisfy one of the exceptions to immunity from attachment identified in the FSIA. *See, e.g.*, 28 U.S.C. § 1610(a) (requiring not only that property be "used for commercial activity in the United States" but also that one of the listed conditions—for example, a waiver of immunity from execution by the

CONCLUSION

For the reasons explained above, bank accounts used by Venezuela's Embassy, consulates, U.N. Mission, or OAS Mission for the functioning of its missions and consulates are immune from attachment or execution under international agreements to which the United States is a party, and the garnishment of such accounts should be vacated based on the declarations submitted by the Venezuelan government. Moreover, any bank accounts that are not immune under international agreements may be attached only in accordance with the FSIA, the procedural requirements of which have not been satisfied here.

Respectfully submitted this 22st day of October, 2014,

JOYCE R. BRANDA
Acting Assistant Attorney General

WIFREDO A. FERRER
United States Attorney

ANTHONY J. COPPOLINO
Deputy Director

s/ Michelle R. Bennett
MICHELLE R. BENNETT (CO Bar No. 37050)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W. Room 7310
Washington, D.C. 20530
Tel: (202) 305-8902
Fax: (202) 616-8470
Email: michelle.bennett@usdoj.gov

Attorneys for United States of America

foreign state or the foreign state's use of the property "for the commercial activity upon which the claim is based"—be satisfied).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by CM/ECF on October 22, 2014 on all counsel and parties of record on the attached service list.

s/ Michelle R. Bennett
MICHELLE R. BENNETT

SERVICE LIST

Devengoechea v. Bolivarian Republic of Venezuela,
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Attorneys for Plaintiff Ricardo Devengoechea

Martha Rosa Mora
Avila Rodriguez Hernandez Mena & Ferri
2525 Ponce de Leon Blvd., Penthouse 1225
Coral Gables, FL 33134
305-779-3567
Fax: 305-779-3561
Email: mmora@arhmf.com

Max Richard Price , Jr.
Law Offices of Max R. Price, P.A.
6701 Sunset Drive, Suite 104
Miami, FL 33143
305-662-2272
Fax: 305-667-3975
Email: mprice@pricelegal.com

Attorneys for Defendant Bolivarian Republic of Venezuela

Joseph D. Pizzurro
Robert B. Garcia
Curtis Mallet-Prevost Colt & Mosle
101 Park Avenue
New York, NY 10178-0061
212-696-6000
Fax: 697-1559
Email: jpizzurro@curtis.com
Email: robert.garcia@curtis.com

Lori P. Lustrin
Mitchell Edward Widom
Bilzin Sumberg Baena Price & Axelrod, LLP
1450 Brickell Avenue, Suite 2300
Miami, FL 33131-3456
305-374-7580
Fax: 305-351-2265
Email: llustrin@bilzin.com
Email: mwidom@bilzin.com

Attorney for Garnishee Bank of America, N.A.

Miguel Mario Cordano
Liebler Gonzalez & Portuondo PA
44 W Flagler Street, 25th Floor
Miami, FL 33130-4329
305-379-0400
Fax: 379-9626
Email: mc@lgplaw.com